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FILED
MAR 26 1965
JOHN F. DAVIS, CLERK

United States Supreme Court

No. 878

October Term, 1964

J. MINOR SULLIVAN, III,

Petitioner,

vs.

STATE OF NEW JERSEY.

ANSWER TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW JERSEY

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To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

COUNTER-STATEMENT OF QUESTIONS INVOLVED

1. Can an indictment be attacked after trial, conviction and affirmance on appeal?

2. Are rules of procedure of state courts to be ignored?

3. Are trial errors, if made, a deprivation of due process?

COUNTER-STATEMENT OF FACTS

On February 10, 1948, J. Minor Sullivan, M.D. and George A. Corio, M.D. were requested by the then prosecutor to go to the Trenton police headquarters. There they examined five individuals who executed statements. Two days later they examined a sixth person at the time he executed a statement. Both Dr. Sullivan and Dr. Corio testified at the two subsequent trials of the said individuals for murder. State v. Cooper (1942) 2 N.J. 540 and (1952) 10 N.J. 532.

On December 23, 1952, the Mercer County Grand Jury returned an indictment charging Dr. Sullivan with perjury in the second trial. On January 29, 1953, a motion was made to dismiss the indictment on the grounds it did not charge a crime, did not advise the defendant with what crime he was charged, the allegations of falsity were not sufficiently certain and it did not recite contradictory facts. After denial of the motion, leave to appeal was secured. On May 11, 1953, the Appellate Division of the New Jersey Superior Court affirmed the denial of the motion. 25 N.J. Super. 484. Certiorari was denied by the New Jersey Supreme Court and this court. 13 N.J. 289 (1953); 347 U.S. 903 (1954).

Meanwhile another indictment was returned charging the defendant with false swearing based on the same facts. This indictment was also attacked. The Appellate Division of the New Jersey Superior Court found this pleading proper, 33 N.J. Super. 138 (1954).

The trial commenced on January 23, 1956, and required nine days to conclude. The Court, sitting without a Jury, found defendant guilty on all counts except the fifth. Motion for a new trial was made and denied. Appeal was had to the New Jersey Supreme Court. The conviction was affirmed as to three counts and reversed as to the same number. 24 N.J. 13 (1957). Certiorari was denied by this Court on September 28, 1957. 355 U.S. 52 (1957).

The defendant, five years later, on August 16, 1962, moved for the quashing of the indictment and for a new trial. Defendant received leave to inspect the Grand Jury minutes and ascertained the only witness who appeared before the Grand Jury was the then court reporter, Gladys Barry.

On May 12, 1964, the trial court denied defendants latest motions. From that denial the defendant sought certiorari. The New Jersey Supreme Court denied same on November 9, 1964, 43 N.J. 356. Certiorari is now sought to this Court.

LEGAL ARGUMENT

Petitioner alleges as reasons for the allowance of the writ the purported insufficiency of evidence before the Grand Jury, the exclusion of proffered exhibits and other alleged trial errors.

POINT I

Judicial Errors by State Courts Do Not Violate the Fourteenth Amendment.

Petitioner contends that notations made previous to his trial should have been allowed in evidence. This contention was specifically raised by petitioner in his initial Appeal to the New Jersey Supreme Court. 24 N.J. 13. It was also raised in petitioner's former application for certiorari to this Court. 355 U.S. 52. The New Jersey Supreme Court held that the Trial Court's decision was correct. This Court refused to review that determination.

Assuming for the purpose of this argument that the Trial Court's action was indeed erroneous, same would not constitute a proper ground for review by this Court. Gryger v. Burke, (1948) 334 U. S. 728, rehearing denied. 355 U.S. 837. Even if errors are made by a trial judge they are not a deprivation of due process.

POINT II

Petitioner's Motions Were Not Timely Made.

Petitioner was convicted on February 9, 1956. Several years thereafter he made a motion to quash the indictment or in the alternative for a new trial. The New Jersey Supreme Court has adopted rules for the conduct of criminal proceedings before the Courts of that State. Among those rules is found R. R. 3:5-5 (b) (2). That provision of our rules at the time in question was as follows:

> Defenses and objections based on defects in the institution of the prosecution or in the indictment or accusation other than that it fails to show jurisdiction in the court or to charge an offense must be raised by motion before trial. The motion shall include all such defenses and objections then available to the defendant. Failure so to present any such defense or objection constitutes a waiver thereof, but the court for cause shown may grant relief from the waiver. Lack of jurisdiction or the failure of the indictment or accusation to charge an offense shall be noticed by the court at any time during the pendency of the proceeding.

Presumably, the instant attack on the indictment is pursuant to the above cited provision of the rules of the New Jersey Criminal Procedure. Said provision clearly requires such attacks be made prior to trial. It further provides that failure to object prior to trial constitutes a waiver thereof. The rule does contain provision for extraordinary cases "For cause shown" relief may be granted despite failure to move prior to trial. No effort was made to show any such "cause" in these proceedings. Lacking same, the quoted provisions of the rule bar the motion attacking the indictment.

The companion motion for a new trial was made pursuantly in accordance with the provisions of New Jer-

sey R. R. 3:7-11 (a). That provision of the New Jersey procedural rules is as follows:

> The court may grant a new trial to a defendant if required in the interest of justice. If trial was by the court without a jury the court may vacate the judgment if entered take additional testimony and direct the entry of a new judgment. A motion for a new trial based on the ground of newly discovered evidence may be made at any time, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within 10 days after verdict or finding of guilt, or within such further time as the court may fix during the 10-day period.

Under the New Jersey Court rules a motion for new trial on the basis of newly discovered evidence may be made at any time while all other motions for a new trial must be made within ten days of the judgment of conviction. Each and every ground now advanced for the granting of a new trial was considered by the Trial Court and the New Jersey Supreme Court on Appeal. Such evidence cannot be termed newly discovered evidence. Accordingly the motion is barred by the said rule, R. R. 3:7-11, since it was not made within ten days of the conviction.

The aforementioned rules were adopted by the New Jersey Supreme Court to regulate the conduct of criminal cases. There is nothing discriminatory in the rules and they are reasonably necessary to insure an orderly procedure for the conduct of the business of the New Jersey Courts. These rules apply to all criminal cases and hence cannot be deemed violative of any constitutional right of the petitioner.

POINT III

The Indictment Having Served Its Purpose Cannot Now Be Nullified.

An indictment is the vehicle used to present the defendant before the bar of justice requiring him to stand trial to determine his guilt or innocence of the charge against him. The requirement of an indictment is to prevent corrupt or overzealous prosecuting authorities from bringing unfounded charges against the citizenry. However, once guilt has been established the indictment has fulfilled its function, particularly when that guilt has been affirmed on appeal. People v. Giordano, (N. Y. Ct. App. - 1921) 231 N. Y. 633; People v. Nitzberg, (N. Y. Ct. App. - 1943) 289 N. Y. 523, 47 N. E. 2d 37. Accordingly, the indictment cannot now be successfully attacked.

CONCLUSION

The petition should be denied for the foregoing reasons.

Respectfully submitted,

VINCENT PANARO
Mercer County Prosecutor

By: JOHN J. BARRY
First Assistant Prosecutor